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IN THE

Supreme Court of the United States

MULVANEY MECHANICAL, INC.,

Petitioner,

-v-

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 38,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* MECHANICAL CONTRACTORS ASSOCIATION OF CONNECTICUT, INC. AND PLUMBING-HEATING-COOLING CONTRACTORS NATIONAL ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

1. Mechanical Contractors Association of Connecticut, Inc. ("MCAC") is a voluntary organization of unionized mechanical contractors engaged in business in the State of Connecticut. MCAC is an affiliated member of the Mechanical Contractors Association of America ("MCAA"). MCAC represents the interests of its member contractors in collective bargaining and in legislative, judicial and regulatory matters at the local, state and federal level. MCAA represents the interests of mechanical contractors at the national level, and has previously participated as *amicus curiae* before this Court in California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997).

MCAC member contractors are involved in a broad spectrum of mechanical contracting projects throughout the Northeast. Through their membership in MCAC or otherwise, the vast majority of MCAC member contractors are signatory to, or bound by, collective bargaining agreements negotiated with local unions of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("United Association"). These labor agreements contain interest arbitration provisions which are strikingly similar to the interest arbitration clause at issue in Mulvaney Mechanical, Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38, 288 F.3d 491 (2d Cir. 2002).

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[1]No counsel for either party authored this brief in whole or in part. No entity other than *amici*, its members, or counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters indicating their consent have been filed with the Clerk of this Court.

2. Plumbing-Heating-Cooling Contractors National Association ("PHCC") is a voluntary, national trade organization of plumbing, heating and cooling contractors. It is the oldest trade organization in the construction industry, and is comprised of approximately 3,700 members nationwide. PHCC regularly represents the interests of its member contractors in legislative, judicial and regulatory matters at the federal, state and local level.

PHCC's unionized contractor members are also members of the Union-Affiliated Contractors ("UAC"), a division of PHCC established to represent the special needs, interests and concerns of unionized plumbing, heating and cooling contractors. UAC contractor members are signatory to, or bound by, collective bargaining agreements negotiated with local unions of the United Association. The UAC works to maintain a productive relationship with the United Association and provide member contractors with new, up-to-date national labor agreements and training programs to enhance their competitiveness in the marketplace. These labor agreements typically contain interest arbitration provisions which are similar to the interest arbitration clause at issue in Mulvaney.

The interest arbitration clauses to which MCAC and PHCC contractors are bound provide for interest arbitration before the same dispute resolution body – the Industrial Relations Council for the Plumbing and Pipe Fitting Industry ("IRC"), which is sponsored and maintained jointly by the MCAA, the UAC of the PHCC, and the United Association. The IRC panels which decide interest arbitration cases are comprised of two member representatives from each of the two national trade associations, and four member representatives from the United Association. As a dispute resolution body comprised of contractor and union representatives, IRC is very similar, in terms of its purpose, functioning, and expertise, to the National

Joint Adjustment Board ("NJAB") for the Sheet Metal Industry, the body which imposed the interest arbitration award at issue in Mulvaney.

The Second Circuit panel's opinion in Mulvaney fails to apply the correct legal standards for determining whether contracting parties have agreed to have an arbitrator or a court decide gateway questions of arbitrability. Specifically, the panel incorrectly held that a broadly worded interest arbitration clause contained in a labor agreement requires the arbitrator, not a federal district court, to decide the legal question of whether the union's breach of the agreement's no-strike clause and disavowal of the agreement in related proceedings repudiated the agreement, entitling the employer to rescind the agreement. The Second Circuit panel wrongly concluded, without citation to evidence or authority, that the NJAB was just as qualified as the District Court to decide this highly complex issue of federal labor law – an issue which has divided the Circuit Courts of Appeal, and on which this Court expressly reserved judgment in Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers Int'l, 370 U.S. 254, 265 (1962).

The MCAC and PHCC are uniquely qualified to explain to the Court how interest arbitration in the construction industry really works, and thereby illustrate how the Second Circuit erred in simply concluding that the NJAB was no less qualified than the District Court to decide the dispositive issue of federal labor law upon which the gateway question of arbitrability rests. *Amici* are also uniquely qualified to describe the detrimental impact which the Second Circuit's decision, if allowed to stand, will have on the efficacy of multi-employer bargaining in the construction industry. For these reasons, MCAC and PHCC are especially interested in the questions presented in

the petition for writ of certiorari, and urge the Court to grant the petition.

SUMMARY OF ARGUMENT

Under this Court's precedents including its recent decision in Howsam v. Dean Witter Reynolds, Inc., No. 01-800, 123 S.Ct. 588 (Dec. 10, 2002), a presumption against arbitration applies to gateway arbitrability questions falling within the legal expertise of the federal district courts and beyond the comparative expertise of the arbitration body. In Mulvaney, the threshold arbitrability question required resolution of complex issues of federal labor law: whether Respondent Union repudiated and Petitioner employer rescinded the collective bargaining agreement, thereby terminating the agreement and arbitration clause contained therein as a matter of law, before the Union requested interest arbitration. The broadly worded interest arbitration clause did not clearly and unmistakably evince an intent by the parties to submit this question to the NJAB. Consequently, the District Court, not the Arbitration Board, possessed exclusive authority to decide the question.

The realities of interest arbitration in the construction industry illustrate how the NJAB lacks the qualifications to decide the contract repudiation/rescission issue. Construction contractors and union representatives, not lawyers or retired judges, comprise the NJAB and comparable arbitration boards in the industry. The individual arbitrators' expertise lies in their specialized knowledge of labor market conditions, making them well-qualified to handle the typical interest arbitration, where their duties focus on imposing mandatory terms and conditions of the parties' renewal labor agreement. Legal issues are rarely presented or considered. In fact, in Mulvaney, the record of the NJAB's decision, which was issued the day after the hearing, contains no evidence that the

Arbitration Board even considered the complex issues of federal labor law presented. Instead, it summarily declared its own jurisdiction over the matter, and then proceeded to impose a 46-month collective bargaining agreement on the non-consenting employer.

The Second Circuit's decision, if allowed to stand, will have a significant detrimental impact on labor-management relations in the construction industry. By allowing unions to breach the no-strike clause of a labor agreement, disavow the very existence of that agreement, but later obtain interest arbitration (and a new labor agreement) after the strike fails, the decision will reduce the incentive of employers to enter into multi-employer collective bargaining agreements containing interest arbitration provisions. Unions will not agree to no-strike clauses, and the occurrence of strikes, lockouts and work stoppages could increase dramatically. The effectiveness of multi-employer bargaining in achieving stable labor markets will be diminished. To avoid these harmful results, and their potentially damaging impact on the national economy, the decision below merits review by this Court.

ARGUMENT

I. UNDER THIS COURT'S PRECEDENTS, INCLUDING *HOWSAM*, COURTS MUST APPLY THE ANTI-ARBITRATION PRESUMPTION IN DETERMINING WHETHER PARTIES TO A LABOR CONTRACT AGREED TO ARBITRATE THE LEGAL ISSUES OF CONTRACT REPUDIATION AND RESCISSION.

This case presents the threshold question of whether the "special arbitration-disfavoring presumption", see Howsam, 123 S.Ct. at 593, or the "liberal federal policy favoring arbitration", see Moses H. Cone Memorial Hosp. v. Mercury Constr.

Corp., 460 U.S. 1, 24 (1983), applies in construing a labor contract to determine whether the parties agreed to arbitrate the issues of contract repudiation and rescission. In First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), this Court explained the general rule for choosing between the two presumptions: the law presumes "a particular merits-related dispute is arbitrable . . . [as] within the scope of a valid arbitration agreement", id. at 944-45 (internal quotations omitted), but reverses that presumption on the question of who decides arbitrability, so that "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." Id. at 944 (quoting AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)). This general rule of construction applies to both commercial contracts governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq., see First Options, 514 U.S. 938, and collective bargaining agreements governed by the Labor Management Relations Act, 29 U.S.C. § 141 et seq., see AT&T Techs., 475 U.S. 643.

In its recent decision in Howsam, this Court acknowledged that a "question of arbitrability" is presumptively "an issue for judicial determination", 123 S.Ct. at 591 (quoting AT&T Techs.), but cautioned that not every "potentially dispositive gateway question" raises a "question of arbitrability" for the court to decide. Id. at 592 ("Linguistically speaking, one might call any potentially dispositive gateway question a 'question of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits.") The Court proceeded to set forth the standards for determining whether a "gateway question" raises a "question of arbitrability" to which the arbitration-disfavoring presumption applies. Generally, the arbitration-disfavoring presumption applies to circumstances "where contracting parties would likely have expected a court to have decided the gateway

matter," but the arbitration-favoring presumption applies to circumstances "where parties would likely expect that an arbitrator would decide the gateway matter." Id. at 592. More specifically, the law will infer that the parties intended to select a decisionmaker "comparatively more expert" about the matters in dispute, as "it is reasonable . . . for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy – a goal of arbitration systems and judicial systems alike." Id. at 593. Howsam therefore requires an assessment of whether the arbitrator or the court is "comparatively more expert" to decide the "gateway matter" presented. See generally id.

This Court's precedents have distinguished between matters falling within the comparative expertise of labor arbitrators and the courts, respectively. In Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the Court observed that "[t]he labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts." Id. at 581-82. The expertise of labor arbitrators lies in "settl[ing] disputes at the plant level – disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements." Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). Accordingly, the bargaining parties select the arbitrator based on their confidence in his specialized knowledge of industry and shop custom and practice, matters on which "[t]he ablest judge cannot be expected to bring the same experience and competence . . . because he cannot be similarly informed." Warrior & Gulf, 363 U.S. at 582. This specialized knowledge commonly encompasses matters such as wages, hours, seniority, employee benefits, and workplace

safety. See, e.g., Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974).

In addressing arbitrability under section 301 of the Labor Management Relations Act, this Court has routinely held that merits-related disputes are presumptively arbitrable, but the question of who decides arbitrability is not. See, e.g., Warrior & Gulf, 363 U.S. at 583 n.7 ("Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose."); AT&T Techs., 475 U.S. at 651 (anti-arbitration presumption applies to determining whether the parties to a collective bargaining agreement agreed to arbitrate arbitrability, but "it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement."). Thus, the arbitration-favoring presumption applies only to those merits-related disputes within the "greater institutional competence of arbitrators in interpreting collective-bargaining agreements." Id. at 650.

In distinguishing between matters falling within and without the special expertise of labor arbitrators, this Court's precedents establish that the court, not the arbitrator, possesses the exclusive authority to decide pure questions of law, in the absence of a contractual provision clearly and unmistakably reserving such questions for the arbitrator. For example, in Enterprise Wheel & Car, the Court explained that "an arbitrator is confined to interpretation and application of the collective bargaining agreement", and although he may "look[] to 'the law' for help in determining the sense of the agreement", "his award is legitimate only so long as it draws its essence from the collective bargaining agreement." 363 U.S. at 597-98. Conse-

quently, the arbitrator exceeds the scope of his authority where the award "may be read as based solely upon the arbitrator's view of the requirements of enacted legislation". Id. at 597. More recently, in Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1999), the Court explained that "the presumption of arbitrability . . . found in § 301 of the Labor Management Relations Act" applies to union grievances under an existing collective bargaining agreement ("CBA"), but "[t]hat presumption . . . does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA*." Id. at 77-78 (emphasis in original). However, the matter of "what federal law requires . . . is not a question which should be *presumed* to be included within the arbitration requirement." Id. at 79 (emphasis in original); see also Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) ("the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land").

The foregoing Supreme Court precedents demonstrate that the Second Circuit panel in Mulvaney erred in blindly applying the arbitration-favoring presumption without assessing whether the Arbitration Board or the District Court was "comparatively more expert" on issues of contract repudiation and rescission as applied to collective bargaining agreements. See Howsam, 123 S.Ct. at 593. Unquestionably, any rational consideration of the law, the facts of record, the realities of interest arbitration in the construction industry, and the policies of the federal labor laws, compels only one possible conclusion: that the District Court possesses vastly greater expertise than the Arbitration Board for deciding the complex legal questions presented. Consequently, it is far more reasonable for the law to presume that the parties expected the District Court to decide these gateway questions.

A. The Federal District Court, Not the Arbitration Board, Possesses the Expertise Necessary To Decide Whether Collective Bargaining Parties Repudiated and/or Rescinded a Labor Contract.

The Second Circuit's application of the arbitration-favoring presumption, rather than the arbitration-disfavoring presumption, was based on its erroneous and unsupported assumption that "[t]he [Arbitration] Board is just as qualified as the district court to determine whether Local 38 repudiated its right to arbitrate." Mulvaney, 288 F.3d at 504. Not surprisingly, the Second Circuit cited nothing to support this baffling conclusion. Id. Had the panel considered the comparative expertise of the two decision-making bodies as applied to the matters in dispute, as this Court's precedents require, see supra, it would have found the Arbitration Board completely unqualified to decide the complex issues of law central to the gateway question of whether the parties were bound by a valid labor contract at the time the Union requested interest arbitration.

The difficult and unresolved nature of the legal issues presented by this gateway dispute demonstrate that it fell far beyond the comparative expertise of the Arbitration Board. Before deferring to the arbitration award, the Second Circuit panel discussed the conflict among the Circuit Courts of Appeals "regarding the wisdom of applying traditional contract principles to disputes concerning an alleged termination of a collective bargaining agreement." Mulvaney, 288 F.3d at 501. The panel acknowledged that this Court's decision in Drake Bakeries "left open the possibility that a strike by a union in contravention of the no-strike clause of an agreement might constitute such a repudiation of the arbitration provision that the employer would be justified in rescinding the entire agreement." Id. However, after surveying the conflicting decisions of the federal Circuit Courts on what is indisputably

a pure issue of law, the panel illogically concluded that the Arbitration Board, rather than the District Court, possessed the exclusive authority to decide the issue in the context of this case. Id. at 502.

The Second Circuit panel erred as a matter of law, contrary to this Court's decisions in AT&T Techs. and Howsam, in holding that "when . . . there is a broadly worded interest arbitration clause, the question of whether an agreement has been repudiated is to be determined by the arbitrator." Id. at 503. The panel ignored the rule of AT&T Techs., that "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator . . . [u]nless the parties clearly and unmistakably provide otherwise". 475 U.S. at 649. Here, a finding that the parties repudiated and rescinded the labor agreement before the Union requested interest arbitration would mean that the agreement was null and void at the time in question – *i.e.*, there was no agreement to arbitrate. Only a court can decide that issue.

Had the panel engaged in the assessment required by Howsam, it would have easily determined that: (1) the District Court possessed the expertise to decide whether and to what extent contract principles of repudiation and rescission apply to the labor agreement between Mulvaney and Local 38, and whether application of those legal principles to the undisputed facts of record compels the conclusion that the labor agreement had terminated as a matter of law before the Union requested interest arbitration; and (2) the Arbitration Board possessed the expertise to decide those matters of wages, benefits, and working conditions implicated in any underlying interest arbitration.

Interest arbitration boards in the construction industry, including the NJAB in this case, consist of equal numbers of

construction contractors and union representatives. The NJAB is established and maintained by agreement between the Sheet Metal and Air Conditioning Contractors' National Association, and the Sheet Metal Workers' International Association. (See Procedural Rules of the National Joint Adjustment Board for the Sheet Metal Industry (2002), at 3, *available at* http://www.smacna.org/products/njab).[2] The NJAB was created "to promote, improve and maintain peaceful labor-management relations by creating this medium for adjudication of locally deadlocked disputes and to discourage strikes, lockouts and work stoppages in the entire sheet metal industry." (Id.)

Amici MCAC and PHCC are in a unique position to address the qualifications and expertise of interest arbitration boards in the construction industry, as PHCC appoints two of the four management members comprising the IRC interest arbitration board, and MCAC is party to a labor agreement providing for interest arbitration before the IRC. The IRC, the NJAB, and other interest arbitration boards in the construction industry are not equipped or qualified to decide issues of law or apply complex legal principles to undisputed facts.[3] Such boards are composed of equal numbers of contractor representatives and union officials. It would be rare to find a panel member who

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[2] Similarly, the multi-employer labor agreement to which *amicus* MCAC is signatory, provides for interest arbitration before IRC, which is sponsored by the MCAA, the UAC of the PHCC, and the United Association. See Statement of Interest, supra.

[3] The District Court's decision in this case was decided on cross-motions for summary judgment, based on undisputed facts. Mulvaney Mechanical, Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38, No. 3:98CV1750 (RNC), 2000 U.S. Dist. LEXIS 22125 (D.Conn. Mar. 31, 2000) (Ruling & Order) (reprinted in Appendix B of Petition for Writ of Certiorari, at 25a), rev'd, 288 F.3d 491.

has had any legal training. While individual representatives who serve on construction industry interest arbitration boards have expertise with respect to market conditions in the industry and the needs of contractors and union members – the very issues implicated in interest arbitration – they lack similar qualifications to decide complex legal issues.

The typical construction industry interest arbitration proceeding involves a brief consideration of the market conditions in the relevant geographical jurisdictions, and the needs of the parties, and the board then imposes on the parties a set of mandatory terms and conditions of employment to comprise the essentials of the renewal labor agreement. Legal issues are rarely presented for consideration, and are typically sidestepped.

In the experience of the members of *amici* contractors associations, interest arbitration in the construction industry is much more basic than any process the Second Circuit panel may have contemplated, and is nothing like grievance arbitrations to which courts readily defer. Instead, the typical interest arbitration consists of a very brief hearing. There may be a brief discussion of the most hotly contested economic issues. The parties submit in advance their positions on proposed contract terms they seek and what they are willing to give. In many cases, the arbitration board simply imposes on the parties the same mandatory terms and conditions as those contained in the standard industry association agreement covering the geographical jurisdiction where the parties operate. As the process is so simple, cases are decided with dispatch. Little time is needed for deliberating, weighing the evidence, or articulating any basis of reasoning to support the decision.[4]

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[4] IRC Rules require a final decision within forty-eight (48) hours after close of the hearing.

Such interest arbitration boards act nothing like a court, and cannot provide an adequate or appropriate substitute for judicial resolution of complex legal issues. Cf., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (federal employment claims of non-union employee held presumptively arbitrable, "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum"). As experts on labor conditions in the sheet metal industry, the NJAB members unquestionably possess the comparative expertise to decide run of the mill interest arbitration questions such as how much to pay journeymen and apprentice sheet metal workers in Connecticut and Southeastern New York, rules governing overtime and shift work, and how much to contribute to employee benefit trust funds. However, they are generally unfamiliar with legal concepts and principles such as contract repudiation and rescission, and have no qualifications to decide the question left open by this Court in Drake Bakeries.

The federal District Court, not the Arbitration Board, possesses the comparative expertise to consider legal principles of contract repudiation and rescission, and determine whether and to what extent such principles apply to the termination of the collective bargaining agreement in this case. Deciding the repudiation/rescission issue requires a declaration of the law, and application of the law to the undisputed facts of record – tasks well beyond the expertise of construction industry interest arbitration boards. Accordingly, under this Court's arbitrability precedents including Howsam, the arbitration-disfavoring presumption must apply to determining whether parties to a construction industry labor contract agreed to arbitrate the issues of contract repudiation and rescission.

The record below abundantly demonstrates the expertise of the federal District Court, and the lack of any expertise of the

Arbitration Board, to decide the gateway questions presented. The District Court examined the undisputed facts of record, reviewed the applicable case law including this Court's decision in Drake Bakeries, see Mulvaney, 2000 U.S. Dist. LEXIS 22125, at **2-9, and declared the rule of law which would decide the controversy: "The principle that a contracting party is released from its obligations if the other party repudiates the contract applies to collective bargaining agreements." Id. at **8-9. The District Court then compared the facts at bar with the applicable legal authorities, articulated its reasoning, and made the following conclusions of law: the Union repudiated the interest arbitration clause of the collective bargaining agreement (CBA), id. at *10, which gave the employer the right to rescind the CBA, id. at **10-12, and the employer subsequently exercised that right, id. at **12-14, which meant that the CBA was no longer in effect at the time the Union requested interest arbitration, rendering the arbitration award null and void. Id. at *14.

In stark contrast, the record of the interest arbitration proceeding provides no evidence to suggest that the NJAB even considered the legal issues of contract repudiation or rescission. The actual hearing was extremely short, as the Board's agenda shows that it was scheduled to hear eight cases that day. The Board's decision barely exceeds one full page in length. As to the gateway question presented, the decision states only: "A review of the record demonstrated that all procedural requirements had been met and the matter, therefore, was properly before the NJAB for decision." (See Appendix at 1a). The decision was signed on July 1, 1998, ***only one day after the hearing***. (Id.) The Board obviously did not consider the law, or apply legal principles to the facts; it simply declared its own jurisdiction by administrative fiat. Unquestionably, this case constitutes a prime example of why the law presumes contracting parties have not agreed to arbitrate

arbitrability. As this Court recognized in AT&T Techs., allowing a labor arbitrator "the power to determine his own jurisdiction", where the contracting parties have not clearly and unmistakably granted him or her such power, would "undercut[] the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties." 475 U.S. at 651 (internal quotations omitted).

B. The Employer Members of *Amici* Contractors Associations Did Not Agree to Submit the Gateway Questions of Contract Repudiation and Rescission to Arbitration.

Amicus MCAC is the signatory party to a multi-employer collective bargaining agreement containing a broadly worded interest arbitration clause strikingly similar to the clause at issue in Mulvaney, and therefore is especially well-suited to address the bargaining parties' contractual intent with respect to the clause's meaning and scope. The contractor members of both *amici* organizations are subject to labor agreements containing similar clauses, and *amici* believe they are well-qualified to explain employers' expectations as to the meaning of those clauses, and how employers likely will react to the Second Circuit's decision if not reversed by this Court.

Amici contractors associations respectfully submit that their members never believed that by signing a labor contract containing an interest arbitration clause similar to the one in Mulvaney, they were agreeing to let an arbitrator decide whether the parties had repudiated and/or rescinded the contract. Instead, these employers held the common-sense belief that the interest arbitration clause covered just that – interest arbitration. Employers in the construction industry

understand that arbitration boards such as the NJAB and IRC possess the knowledge, specialized experience and expertise to handle effectively and quickly the issues presented in the typical interest arbitration – imposing mandatory terms and conditions of employment consistent with prevailing market conditions. *Amici* members would be surprised to learn that questions of law going to the very existence or termination of the contract would be decided by the interest arbitration panel.

It is a well-accepted fact in the construction industry that employers agree to an interest arbitration clause to avoid the possibility of strikes. Cf., Buffalo Forge Co. v. Steelworkers, 428 U.S. 397, 407 (1976) ("The quid pro quo for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration machinery.") The trade-off is that the employer agrees to be bound by interest arbitration, which can have the effect of perpetuating the contractual relationship between the bargaining parties. See Mulvaney, 288 F.3d at 505. Employers represented by *amici* certainly never believed that a union could be allowed to invoke interest arbitration, and thereby extend the life of an otherwise expired collective bargaining agreement, after breaching the no-strike clause and representing to both the National Labor Relations Board and the U.S. District Court that the underlying labor contract was null and void. No reasonable construction industry employer would have agreed to give an arbitration board the authority to decide its own jurisdiction under such extraordinary circumstances.

As a natural result of the Second Circuit's decision (if allowed to stand), employers will be reluctant to agree to interest arbitration provisions in the labor contracts they negotiate. Unions will then refuse to agree to no-strike clauses. See Boys Markets v. Clerks Union, 398 U.S. 235, 247-49 (1970) (recognizing that allowing union to breach no-strike clause

necessarily dissipates any incentive for employers to enter into labor agreements containing the arbitration/no-strike *quid pro quo*, a result directly contrary to the federal policy favoring settlement of labor disputes by arbitration). As a result, occurrences of strikes, lockouts and work stoppages inevitably will increase, thereby impairing industrial peace. Such a result would be completely at odds with "the national labor policy of peaceful resolution of labor disputes", AT&T Techs., 475 U.S. at 650 (quoting Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364, 371-72 (1984)), and would disrupt the delicate balance between labor and management which federal labor law seeks to preserve. In sum, federal law and policy compel application of the anti-arbitration presumption to the complex and unresolved legal issues presented by this case.

Applying the correct legal presumption unquestionably would result in a finding that the parties did not agree to submit the contract repudiation/rescission question to the NJAB, since the clause does not clearly and unmistakably reserve that question for the arbitrator. See AT&T Techs., supra. The clause, similar to the clauses to which *amici* members are bound, provides that "any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement shall be settled" by submission of the dispute to the NJAB. Mulvaney, 288 F.3d at 494-95. This clause necessarily contemplates that the parties will continue bargaining pending interest arbitration. The clause cannot apply where the parties, by their actions, have repudiated and rescinded the contract as a matter of law, so that the contract (and the interest arbitration clause therein) has become null and void. Regardless, the clause does not clearly and unmistakably provide that it applies to disputes concerning repudiation and rescission of the contract as a whole. Consequently, the NJAB had no jurisdiction to decide the dispute, and its award should have been held legally null and void.

II. FEDERAL LABOR POLICY REQUIRES COURTS TO RELIEVE EMPLOYERS OF THE CONTRACTUAL OBLIGATION TO ENGAGE IN INTEREST ARBITRATION WHERE THE UNION HAS BREACHED THE NO-STRIKE CLAUSE AND DISAVOWED THE EXISTENCE OF A LABOR CONTRACT.

The Second Circuit's decision could have a severe and detrimental impact on multi-employer bargaining in the construction industry, by allowing unions brazenly to violate a no-strike clause, repeatedly disavow the existence of a collective bargaining agreement when convenient for them to do so, and then reap the benefit of the interest arbitration clause after the strike fails to achieve the sought-after results. Allowing this result could seriously diminish the interest arbitration/no-strike compromise as an effective means of promoting labor stability and industrial peace in the United States. See Buffalo Forge, 428 U.S. at 423-24 (Stevens, J., dissenting) (refusing to ensure enforceability of arbitration/no-strike *quid pro quo*, by allowing strikes in violation of no-strike clauses, "frustrate[s] the more basic policy of motivating employers to agree to binding arbitration"). It would also diminish the effectiveness of multi-employer bargaining. Generally, multi-employer bargaining benefits both the construction industry and the national economy by facilitating agreement on uniform terms and conditions of employment in the industry. Cf., Brown v. Pro Football, Inc., 518 U.S. 231, 240 (1996) ("Multiemployer bargaining itself is a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor.") Eliminating the interest arbitration/no-strike trade-off as a viable labor-management compromise would make it much more difficult to achieve uniformity and stability of labor market conditions through multi-employer bargaining, which could have a destabilizing effect on the national economy.

Allowing a union to strike in violation of a no-strike clause, and then reap the benefit of interest arbitration after repudiating the agreement, fundamentally contradicts the policies and principles underlying the federal labor laws. To eliminate uncertainty over this issue and establish a uniform national rule of law to resolve the conflict among the Circuit Courts, this Court should grant certiorari to decide the question left open by Drake Bakeries. By granting certiorari and resolving the issue once and for all, this Court can correct the manifest injustice of Mulvaney and prevent it from spreading any further harm to labor-management relations in this country.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: February 14, 2003

Respectfully submitted,

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APPENDIX

Decision of National Joint Adjustment Board for the Sheet Metal Industry, dated July 1, 1998

National Joint Adjustment Board
for the Sheet Metal Industry
P.O. Box 220956
Chantilly, VA 20153-0956

Decision

Sheet Metal Workers' Local 38
P.O. Box 119, Starr Ridge Rd
Brewster, NY 10509

Mulvaney Mechanical, Inc.
275 Keeler Drive
Ridgefield, CT 06877

Issue: Article X, Section 8 Proceeding

Ladies and Gentlemen:

The National Joint Adjustment Board (NJAB) met in New York, New York, on June 30, 1998, to consider the above matter.

Gino J. Columbo, Robert W. Santo and Jeffrey S. Dubin, Esq. appeared on behalf of the Local Union. Charles Brough and Robert S. Mitchell, Esq. appeared on behalf of the Employer.

A review of the record demonstrated that all procedural requirements had been met and the matter, therefore, was properly before the NJAB for decision. NJAB member Joseph Massaro was excused from participation in the matter, and was not involved in the deliberations or the decision.

Based on the record and testimony of the parties, the NJAB rendered the following unanimous decision:

> The parties are directed to execute a forty-six month collective-bargaining agreement, effective July 1, 1998, incorporating the same terms and conditions as are in effect in the building trades collective bargaining agreement and any addenda between signatory Contractors and SMWIA, Local 38, covering portions of New York and Connecticut.
>
> In directing that the new agreement be effective on July 1, 1998, the parties are reminded of the provisions of Article XIV, Section 1 of the Standard Form of Union Agreement, which provides that the previous agreement "... shall continue in force and effect until conferences related thereto have been terminated by either party by written notice, provided, however, that if this agreement contains Article X, Section 8, it shall continue in full force and effect until modified by order of the National Joint Adjustment Board or until the procedures under Article X, Section 8 have been otherwise completed."
>
> Under the Standard Form, that provision, as well as Article X, Section 8, including its prohibitions on strikes and lockouts, remained in full force and effect despite any withdrawal by the employer from multi-employer bargaining, or the refusal of the local union to bargain on a multi-employer basis.

Your attention is directed to the following language contained in Article X, Section 8(a) of the Standard Form Union Agreement.

> The unanimous decision of said Board shall be final and binding on the parties reduced to writing, signed and mailed to the parties as soon as possible after the decision has been reached.

BY ORDER OF THE BOARD

s/Arthur Moore
CO-CHAIRMAN

s/Charles D. Corbett
CO-CHAIRMAN

July 1, 1998
DATE